NO. 44203-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TIMOTHY EDWARD CHENAULT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00474-1

BRIEF OF RESPONDENT

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I. FACTUAL SUMMARY

J.D. was seventeen and living with her parents in Vancouver on July 23, 2010. RP 713. On that afternoon she decided to leave her house and take a walk, intending to just get out of the house and perhaps find a cigarette. RP 714-15. She told her mother she'd be back soon, but didn't tell her that she was going to try and find a cigarette as she was not allowed to smoke. RP 715. She walked about four blocks down to an area between Safeway and Walgreens and met up with two acquaintances,

Cameron Fierro and Damien, whose last name she didn't know. RP 715. It was the first time she had met Damien, but she already knew Cameron. RP 716. The trio went looking for cigarettes but were unsuccessful, so they decided to look for someone to purchase alcohol for them. RP 717-18. Cameron thought he knew someone who could buy alcohol and they began looking for him. RP 718. They found "Sergio" and he bought alcohol for them from a Chevron station. RP 719. Sergio bought a 40 ounce Steel Reserve beer for J.D. RP 719. Steel Reserve beer has a higher alcohol content than most regular beer. RP 653. Drinking was not a common activity for J.D. and she had little experience with it. RP 720. J.D. called her mother and told her she was going to hang out with a friend and that she'd be home in an hour or so. RP 721.

J.D., Cameron, Damien and Sergio went to a wooded area called "the spot" and began drinking. RP 722, 936. J.D took a small drink from her Steel Reserve and then Cameron grabbed the bottle and "tapped it," and told her to drink it quickly RP 723. "Tapping" the bottle means shaking the bottle so that the liquid fizzes at the top, requiring the person to drink it quickly or else it will spill out of the bottle. RP 723. J.D. guzzled almost the entire bottle at that point. RP 723. There is a recliner-type chair at the spot, and J.D. had to sit down. RP 723. The boys were throwing knives at a tree and doing "boys will be boys" type things. RP

724. J.D. was not exactly sure what happened after that, and the next memory she has is of Cameron on top of her. RP 727. She remembers his pulling her pants and underwear down and couldn't stop him. RP 727. She didn't feel capable of telling him "no." RP 727-28. She heard noises and talking and felt as though others were present. RP 727-28. At some point she began vomiting and saw Cameron leave with a girl she didn't know. RP 728. Damien was still there, but she couldn't recall anyone else. RP 729. The next thing she remembers is the defendant, Timothy Chenault, being there. RP 729. She had never met him before. Id. She recalls Chenault and Damien talking. RP 729. She got up and stumbled and Chenault sat in the chair, pulling her into his lap. RP 730. The next thing she remembers is being on the ground with her pants down. RP 730. The defendant was having sex with her. Id. She didn't feel capable of participating in intercourse, and didn't ask the defendant to do that to her. Id.

The next thing she recalls is being in the chair again and talking to Damien. RP 731. She thought Damien wanted to get her out of there because it was getting dark, and he put her on a bike and half dragged, half walked her to his house. RP 731-32. She was feeling sick and intoxicated at this time. RP 733. She recalled that at Damien's house he let her use the bathroom and gave her water and food. RP 733. He gave her a blanket and

took her to an elementary school close by. Id. Once there he laid the blanket down and she sat down on it, whereupon Damien raped her too. RP 734. She was still intoxicated and felt numb. Id. She just wanted everything to stop and to be able to sleep. Id. The next thing she recalls is answering a phone and hearing a police officer on the other end of the line. RP 734. J.D. never called her mom that night because she was afraid of getting in trouble. RP 735.

Officer Dustin Nicholson of the Vancouver Police Department responded to a 911 call from J.D.'s mom, who called to say her seventeen year-old daughter was missing. RP 459. When Nicholson called her cell phone J.D. awoke and answered the call. RP 461, 464. She became hysterical. RP 461. She didn't know where she was. RP 461. Nicholson told her to hang up and call 911 so they could track her location. Id. It worked, and she was found at Hearthwood Elementary school. RP 462. She was hysterical and crying. Id. Nicholson called an ambulance for her, and she told him she hurt in her groin area. RP 464. She didn't want Nicholson getting close to her or touching her and was screaming. RP 464. She expressed the same reticence with the ambulance personnel. RP 465. She had to be put on a stretcher because she wasn't able to walk to the ambulance but also didn't want to be touched. Id. Nicholson noted in his report that she was "falling down." Id.

Sexual assault nurse Mercedes Wilson conducted an examination of J.D. at Southwest Washington Medical Center. RP 495-98. She found J.D.in a very upset state, angry at times and hyperventilating, and saw debris on her clothing. RP 499. J.D. had bruises and abrasions on her left hip and left ankle, both of her knees were red and had dirt on them, she had a bruise above her left knee and on her right arm, and a red area off of her sternum, tenderness and redness in the back of her neck at the base of her spine. RP 500. The back of her head was painful to the touch and she had petechiae. RP 501. Chenault's DNA was found in the victim's underwear. RP 611. J.D. was not given a blood test at the hospital, but a urine sample was taken. RP 644. The urine was negative for ethanol but acetone was found as well as Zopiclone and Oxazepam. RP 644. Those drugs are central nervous system depressants. RP 644-45. The effects of these drugs, when combined with each other and with alcohol, are additive. RP 645. The forensic report did not indicated the amount of these drugs in J.D.'s urine, just their presence. RP 646.

Sarah Swenson, a forensic toxicologist, estimated that J.D. may have had a BAC as high as .165 after drinking and absorbing the Steel Reserve. RP 670. J.D. never drank with Chenault, only with Damien and Cameron. RP 920.

Damien Kennison and Cameron Fierro both pled guilty to raping J.D. RP 752, 1106.

Russell Barnes, a fifty-three year-old man who occasionally frequented the spot to drink beer with friends, saw Chenault and the victim at the spot that day. RP 935-37. He saw the victim on the defendant's lap being bounced like a rag doll. RP 937. As soon as the defendant saw him he pushed the victim off his lap and she fell face first in the dirt. RP 938. The victim didn't move or make a sound. RP 938. Barnes believed she couldn't get up. Id. The defendant told Barnes "She's all fucked up." RP 938. Barnes left for the Chevron to go get a beer and cigar and then returned to the spot. Id. When he returned, the defendant and victim were in the chair and the victim was face-up in the chair. Id. The defendant was "over the top of her, and it looked like he was just finishing up and he was pulling up his shorts in the front, and they're elastic-type, Hawaiian-type shorts." Id. The victim was rambling, slurring her words and incoherent. RP 939. At one point she found a dollar and the defendant said "that's my fucking dollar, bitch." RP 940. It appeared to Barnes that the victim had consumed something intoxicating. RP 941. He said he has been around drinking all his life and "I've never seen anyone behave like that." RP 941-42. He said she was pretty out of it and couldn't focus on anything. RP 942. Barnes was concerned for the victim and told Damien, who was

also there, that he couldn't just leave her there. RP 944. She was having difficulty walking and Barnes had no doubt she was intoxicated. RP 945. When Barnes first came upon the defendant and victim that day he thought maybe they were boyfriend girlfriend, but when he came back after his trip to Chevron and saw how the defendant treated her, he felt this was not a normal situation. RP 946-47. Barnes said the victim was not physically responsive to the defendant and was not even able to stand up without support. RP 948. Barnes also saw the defendant, who is African-American, telling the victim she "just had sex with some black guy," in an effort to make her believe it was some other African-American male who had intercourse with her. RP 937, 950.

The defendant brought two beers with him to the spot that day. RP 1161-63. He claimed that when he arrived the victim was there with Damien, flirting with him. RP 1160. He said the victim came over to him in the chair and talked to him, and that she appeared "tipsy." RP 1161. The defendant, when questioned about this incident, initially lied to Detective John Ringo and denied having intercourse with J.D. RP 1193. He later admitted that was a lie. RP 1193, 1213. He admitted to Ringo, in discussing the incident with J.D, "she was just like saying stupid, weird stuff, and then I was like 'You know, you're obviously,' this chick ain't here." RP 1212. He also lied to Ringo about ejaculating in J.D., claiming

that he pulled out prior to ejaculation because he could tell she had been drinking and "had a conscience, " and "because she seemed drunk and...this just ain't right." RP 1193, 1212-14. He admitted to Ringo that J.D. "looked pretty drunk." RP 1200. He also told Detective Barb Kipp that he knew J.D. was "messed up" and "didn't really know what she was doing." RP 1225.

Additional facts are set forth where necessary in the argument section.

II. PROCEDURE

The defendant was charged with rape in the second degree by engaging in sexual intercourse with J.D. when J.D. was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 5. He was convicted as charged. CP 63.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING CHENAULT'S PROPOSED ADMISSION OF EVIDENCE OF THE VICTIM'S ALLEGED MENTAL ILLNESS.

Chenault complains that he was not permitted to introduce evidence that the victim was mentally ill. Below, he claimed that the

evidence should be admitted to rebut any inference that Chenault drugged the victim without her knowledge or caused her to consume alcohol. RP 112, 442, 447, 449. Because the State confirmed it had no intention of making such a suggestion, and did not, in fact, make such a suggestion, the court ruled the evidence was not relevant. RP 121-24, 295-96. Chenault wanted the jury to hear what her "diagnosis" was, and wanted the jury to hear that she was being treated for "risk-taking behavior." RP 112. The court pointed out that whether the victim had a history of engaging in risk-taking behavior was not relevant, and would be inadmissible in the same way sexual history is inadmissible to prove consent under the rape shield statute. RP 113. The trial court characterized this as "scarlet letter" type evidence, and pointed out that sexual assault victims don't open the door to their private mental health history just by virtue of having been sexually assaulted. RP 125. Defense counsel renewed his motion to admit this evidence on the first day of trial, arguing that her physical behavior at the time of the rape could have been "the byproduct of mental conditions" rather than due to intoxication. RP 296. The trial court again wanted to know why that would be relevant, and defense counsel couldn't come up with an argument. RP 296-99. During his opening statement, defense counsel violated the court's order and brought up the victim's mental illness and when asked why, he argued that

it was relevant to her ability to perceive the facts. RP 437-39. The court again ruled that it was not relevant, remarking that there are a fair number of people in this world who suffer from mental illness and it doesn't impair their ability to perceive facts and events. RP 439-40. The court reminded defense counsel that he had reviewed the victim's medical records in-camera and that they do not show an inability to perceive facts and events. RP 440.

On appeal, Chenault now claims the trial court abused its discretion by denying admission of this evidence because it was relevant to show that she had a mental condition which caused her mental incapacity or physical helplessness[1] at the time of the rape. This claim is without merit.

Putting aside the fact that Chenault had no interest in helping the State prove the victim's mental incapacity or physical helplessness at the time of the rape, the victim's mental illness (assuming she suffered from one, which the State does not concede), was not relevant to any issue before the jury. To paraphrase the trial court, it simply didn't matter what caused the victim's mental incapacity or physical helplessness--it only

[1] It appears that Chenault agrees that J.D.'s behavior showed that she was mentally incapacitated and/or physically helpless, but argues, as he did below, that it somehow makes a difference whether the incapacity was caused by intoxication, transient illness or organic, pre-existing mental illness. As noted, he cites no authority for this proposition.

mattered that she *was* mentally incapacitated or physically helpless at the time of sexual intercourse with Chenault.

As an initial matter, Chenault frames his argument as though the State did not allege physical impairment as well as mental incapacity. The State alleged both, and the jury was instructed accordingly. CP 52, 55, 56. These are not alternative means of committing the crime. *State v. Al-Hamdani*, 109 Wn. App. 599, 606, 36 P.3d 1103 (2001).

Chenault claims that the victim's alleged mental illness was relevant to whether she truly was mentally incapacitated at the time of the rape, and relevant to whether she would have *appeared* incapacitated to Chenault. Addressing these in reverse order, Chenault cites no authority and makes no real argument about how the victim's alleged mental illness diagnosis, which would have been unknown to Chenault, would be relevant to how she appeared to him on that date. It is nonsensical to suggest Chenault would have perceived that which was right in front of him differently if he believed that the victim's incapacity or physical helplessness was caused by mental illness rather than an intoxicating substance. Again, the *reason* for her decompensated state would have no bearing upon its obvious presence.

With regard to his claim that the victim's alleged mental illness would be relevant to whether she was *actually* mentally incapacitated or

physically helpless at the time of the rape, he again cites no authority for this claim. Chenault seems to suggest that a mental illness *diagnosis* is part of the State's burden of proof in a case in which the State alleges mental incapacity. It is not, and Chenault cites no authority holding that it is. Chenault relies entirely on the statutory definition of mental incapacity for this claim. RCW 9A.44.010 (4) states:

> "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance of from some other cause.

Chenault argues that the victim's "condition" (by "condition," he really means diagnosis) that caused the incapacity is relevant to a determination of whether the incapacity actually existed, but he doesn't say how. Mental incapacity, by the plain language of the definition, can come from a "permanent, organic condition" (see *State v. Summers,* 70 Wn. App. 424, 435, 853 P.3d 953 (1993)), or it can be a transient condition caused by the influence of a substance or some other cause.

To the extent Chenault relies on the idea that the evidence of J.D.'s intoxication was equivocal, that reliance is flawed because the evidence was not equivocal. The evidence showed J.D was heavily intoxicated. Dr. Julien's testimony, contrary to Chenault's claim, did not undermine this evidence in any way. Dr. Julien's entire testimony was premised on his

finding that J.D. did not enter blackout or have amnesia. But the State never alleged that J.D. entered blackout. The State asked "So all of your testimony today is based on amnesia?" Julien answered "Yes, I was not asked to opine whether she had any psycho-motor impairments." See RP 1321. Julien was forced to concede that the victim, even at a high estimate of 160 lbs., would have had a blood alcohol level of at least .17. See RP 1306. Within three hours after pounding almost all of a the 40 oz. Steel Reserve, her blood alcohol level would still have been an extremely high .12 or .13. RP 1313. And the jury heard that the reason for J.D.'s negative ethanol urine test could have been attributable to the length of time between the drinking and the taking of the urine sample (as opposed to the length of time between the drinking and the rape), and could have also have been attributable to the subject having urinated just prior to providing the sample. RP 642-43. Julien was also forced to concede that, contrary to his absurd testimony on direct that so long as a person maintained an alcohol level below in incredibly high .25, he or she would be "awake and active," that alcohol intoxication, even at low levels, causes diminished environmental awareness, reduced response to sensory stimulation, depressed cognitive function, disinhibition, increased drowsiness, and lethargy. RP 1313, 1317-18.

So, to the extent that Chenault's claim of relevance of the victim's alleged mental illness is premised on the idea that the evidence somehow proved J.D. had not consumed alcohol, it is baseless. The jury had ample evidence on which to conclude that J.D. was intoxicated.

The trial court's decision to admit or deny evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Neal*, 144 Wn. 2d 600, 609, 30 P.3d 1255 (2001); *State v. Bourgeois*, 133 Wash.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court did not abuse its discretion because the proffered evidence was not relevant. The only "condition" that matters is the condition of the victim existing at the time of the intercourse. See *State v. Ortega-Martinez*, 124 Wn.2d 702, 716, 881 P.2d 231 (1994). It is possible the condition would be chronic, as it was in *Ortega-Martinez*, supra, and in *State v. Summers*, 70 Wn.App. 424, 853 P.2d 953 (1993), and possible it would be transient. As the Court of Appeals said in *Ortega-Martinez*:

> In addition to the above evidence supporting a finding that S.G. had a condition which prevented her from meaningfully understanding the nature or consequences of

> sexual intercourse *generally*, the jury heard ample evidence from which it could properly have concluded S.G. had a condition which prevented her from understanding the nature or consequences of sexual intercourse *at the time of the offense*. It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. This treatment of the two as identical contradicts the express language of the statute. RCW 9A.44.010(4) specifically notes "[m]ental incapacity is that condition existing *at the time of the offense* which prevents a person from understanding the nature or consequences of the act of sexual intercourse...."

Ortega-Martinez at 716 (Italics ours).

The trial court correctly surmised what was really going on here: Chenault was trying to malign the victim and prejudice the jury against her by raising the boogeyman of mental illness. "The introduction of psychiatric testimony intended to impeach the complainant's credibility can serve as an end-run around the rape shield laws; it contributes little relevant evidence, but humiliates the accuser and prejudices the jury against her." Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 Penn. L. Rev. 1373, 1375 (2005). All of Chenault's arguments about why he should be able to smear the victim with this evidence were disingenuous. As the court noted, he was searching for a "back door." RP 450. The court said it best when it asked if the victim had injected heroin just prior to Chenault's

arrival and was "totally out of it," what different would that make? RP 448. It would make no difference. A person who comes upon another person in J.D.'s condition has a legal obligation not to have intercourse with her no matter what caused the condition, be it drugs, alcohol, meningitis, psychosis, or some other unknown yet obvious condition. The trial court correctly ruled this evidence was irrelevant.

Because the evidence was irrelevant, the trial court did not unconstitutionally limit his right to present a defense under the Sixth Amendment or article 1, sec. 22. *Summers,* supra, at 435. A defendant has no right to present irrelevant evidence. *Id.* Chenault's claim fails.

II. THERE WAS NO JUROR MISCONDUCT, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.

On the fifth day of trial a juror asked the judge's judicial assistant whether the judge would be issuing instructions to the jury. RP 1125. His curiosity was prompted by information he got from two internet printouts, one from wisegeek.com and one from eHow.com, on how jury service works. See Supp. CP 116. The printouts merely explained the role of the jury foreman. Id. They did not in any way pertain to the facts of the case. They imparted no more information than one would learn from watching

12 Angry Men or a John Grisham movie. The juror was instructed not to share the information he learned with any other juror. RP 1131.

The State agrees that the standard of review of this claimed error is abuse of discretion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). However, there was no error here because there was no juror misconduct. What the juror viewed was not "extrinsic evidence." Extrinsic evidence is defined as "information that is outside all the evidence admitted at trial, either orally or by document." *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). In *Balisok*, jurors reenacted an assault to determine whether it could have happened in the manner reenacted by defense counsel and an associate during closing argument. *Balisok* at 117. The Supreme Court held the trial court correctly denied the motion for a new trial, because the jury did not consider extrinsic evidence. *Balisok* at 118. If a juror reenactment which involved the facts of the case does not constitute extrinsic evidence, it is difficult to imagine how internet printouts about the role of a jury foreman would. The prosecutor correctly noted that from what the trial court had indicated, "he hasn't done anything wrong," and this merely pertained about basic facts related to jury service. RP 1126-27. If looking at this type of information disqualifies one to serve on a jury, then anyone who has watched a television show or movie, or read a book, involving a jury deliberation

scene would be similarly ineligible to serve on a jury. There was no juror misconduct here and the trial court correctly observed that the effect of the juror having looked at the internet printout was harmless. RP 1134.

The trial court did not abuse its discretion in denying Chenault's motion for a mistrial where no juror misconduct occurred. This claim of error is meritless.

III. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT.

Chenault makes two claims with regard to his claim of prosecutorial misconduct: The first claim is that the prosecutor introduced a fact not in evidence when she said, during closing argument, that Chenault said, during his testimony, that the beer he brought to the spot was an Earthquake brand beer. The second is that the prosecutor introduced a fact not in evidence when she said the defendant tried (unsuccessfully) to give alcohol to the victim.

With regard to the first claim, Chenault is correct that the prosecutor mentioned a fact not in evidence: Contrary to what the deputy prosecutor said during closing argument, Chenault did not, in fact, reveal the brand name of the beer that he brought to the spot that day. He testified that he had two beers with him, one of which was partially consumed when he arrived and another that he opened while he was there (see RP at

1161, 1163), but he didn't name the brand. Cameron Fierro alone testified that it was an Earthquake brand beer. There was not, however a timely objection to this statement. The standard of review in a claim of prosecutorial misconduct is as follows:

> A defendant who alleges prosecutorial misconduct must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Dhaliwal* at 578. A defendant who does not make a *timely objection* waives review unless the prosecutorial misconduct "is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

State v. Hartzell, 156 Wn. App. 918, 941, 237 P.3d 928 (2010) (emphasis added). Thus, when a defendant makes a timely objection to a remark he believes constitutes misconduct, the remark must be improper and there must be a substantial likelihood the remark affected the jury's verdict. Where a defendant does not make a timely objection, a stricter standard of review is applied where the reviewing court must find the remark was flagrant and ill intentioned, that it caused prejudice, and that the prejudice could not have been obviated by a curative instruction. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of

affecting the jury verdict.'" *State v. Emery*, 174 Wn. 2d 741, 761, 278 P.3d 653 (2012), quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Stated another way, where there is not a *substantial* likelihood the misconduct of the prosecutor affected the verdict then a defendant's failure to object at trial will preclude relief. Conversely, a defendant is excused from the obligation to object where the remark is so damaging that an objection wouldn't have mattered--because the damage unequivocally could not have been undone with a curative instruction. Stated another way, this second type of misconduct causes incurable prejudice and is the functional equivalent of a mistrial. *Emery* at 762.

The State submits that Chenault did not make a timely objection. A timely objection is one that is lodged immediately following the purportedly improper remark, so that the trial court can immediately rule upon whether the remark is improper and, if so, give a curative instruction. Immediate curative instructions are preferable to delayed ones because delayed instructions bring undue attention to the remark, creating a stronger risk the defendant will be prejudiced. Also, reacting immediately prevents the improper remark from festering in the minds of the jury. In this case Chenault did not object to the remarks he now complains of until after the prosecutor had finished her initial closing argument. The State submits that the objection was not, therefore, timely. Because the remark

was not flagrant and ill-intentioned, and could easily have been obviated by a curative instruction, Chenault should not be awarded a new trial because of it.

The remark was not ill intentioned as it is obvious the prosecutor was confused (as, apparently, was the judge, as he also believed the defendant testified to having an Earthquake beer. See RP at 1473-74). "Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom." *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936). Chenault did, in fact, testify he brought beer to the spot. Perhaps the prosecutor was thrown by the candor of this admission and immediately began thinking about how it was consistent with Mr. Fierro's account of seeing the defendant with a beer, and she just became confused. Whatever the reason for the faulty memory on the part of the prosecutor and the judge, Chenault cannot show that the remark was ill-intentioned, nor can he show a curative instruction would not have obviated the effect of this remark. In fact, following the denial of his motion for a mistrial, Chenault did not even request a curative instruction. And as the court pointed out several times, the jury was instructed that it was the final arbiter of what was said and what wasn't. At Instruction 1, the jury was instructed:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence of the law in my instructions.

CP 44.

Juries are presumed to follow the instructions of the court. *Emery*, supra, at 766. But the primary reason why this remark should not result in a new trial for Mr. Chenault is because it was absurdly collateral. The argument between the lawyers and the trial court, which comprised thirteen pages of the transcript, was almost comical. Whether the defendant brought an Earthquake beer or an unnamed beer to the spot proved nothing. The jury didn't need to know the brand of beer in order to place the defendant at the scene of the crime because he admitted he was there. The jury didn't need to know the brand of beer in order to believe the defendant brought beer with him to the spot because he admitted that he did. The jury didn't need to know the brand of beer in order to find that he had sex with the victim because he admitted that he had sex with the victim. Finally, the jury didn't need to know the brand of beer the defendant brought to the spot in order to decide whether the victim was incapable of consent because it doesn't matter whose beer it was. It also

doesn't matter what substance it was. It could have been beer, it could have been Xanax. It doesn't matter whether she arrived at the spot already in a state of incapacity or she got that way while she was there. All that matters is that she was incapable of consent at the time of the sexual intercourse and the defendant knew it. Who cares what brand of beer the defendant, by his own admission, brought to the spot? The trial court observed that this was a wholly collateral matter, calling it a "remote collateral point." See RP at 1475. The trial court was correct. Moreover, Chenault does not say how this remark, standing alone, prejudiced him. His argument on this matter comprises two sentences of his brief: "Here, the prosecutor's remarks were plainly improper. Contrary to the prosecutor's assertions, Mr. Chenault never testified he was drinking 'Earthquake' beer." Brief of Appellant at 28. The remainder of Chenault's argument surrounds his second claim. This is insufficient to show incurable prejudice. "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery* at 762. This remark is not the type of remark that causes incurable prejudice. Because the jurors were instructed that the lawyer's remarks are not evidence, they likely knew instantly that the prosecutor was mistaken and disregarded the remark. Juries presumably know that lawyers are human.

Chenault has not met his burden of demonstrating that this remark warrants a new trial.

As to the second claim, that the prosecutor referred to a fact not in evidence and/or misstated the testimony when she stated in closing argument that Chenault offered beer to the victim, Chenault is incorrect. That *was* a fact in evidence. The jury heard the testimony of Cameron Fierro. Fierro said this:

> Fierro: I saw a black male with an Earthquake, offering her an Earthquake, and I just told him to leave.
>
> Prosecutor: Okay, What's an Earthquake?
>
> Fierro: An Earthquake is another malt beverage. It's a 12%, it's like this big.
>
> Prosecutor: Is it in a bottle or a can?
>
> Fierro: It's in a can.
>
> Prosecutor: So this person had--this person that you saw, this black male, he, he had a can of Earthquake?
>
> Fierro: Yes.
>
> Prosecutor: What did he do with that can?
>
> Fierro: He tried to offer it to her.
>
> Prosecutor: And what was she doing during that time?
>
> Fierro: Sleeping.

RP 1356-57.

The fact that Chenault offered the victim beer was, in fact, in evidence. Neither Mr. Fierro nor the prosecutor ever claimed that Chenault was successful in the offer; no claim was ever made by any State's witness or the prosecutor that Chenault introduced alcohol into the victim's body. The prosecutor's argued the opposite--that Chenault's offer of alcohol was not accepted by the victim because she was unresponsive, just as Mr. Fierro testified. The prosecutor's argument did not, as Chenault claims, suggest to the jury that the victim's "level of intoxication was directly due to Mr. Chenault's actions." See Brief of Appellant at 29. There is no support in the record for this claim and it is baffling. Moreover, the prosecutor, in an abundance of caution, made clear in rebuttal closing argument that Chenault was not alleged to have provided alcohol to the victim: "If for some reason it appeared that I was arguing to you that Timothy Chenault gave her alcohol, that is not the argument the State was attempting to make." RP 1519.

Chenault also resurrects the silly claim he made below--namely that the prosecutor was precluded from introducing the testimony of Mr. Fierro (or mentioning that testimony during closing argument) that Chenault offered alcohol to the victim because she "assured" Chenault she would not claim that he introduced any intoxicants into the victim's body. Chenault seems to think this bolsters his claim that the State introduced a

fact not in evidence. First, as noted above, the prosecutor did not claim that Chenault successfully introduced alcohol into the victim. She claimed, in accordance with Mr. Fierro's testimony, that he merely offered it. Second, the "assurance" Chenault refers to has no bearing on this claim. The "assurance" came in response to Chenault's repeated and spurious attempts to introduce the victim's mental illness into the trial. He argued that her mental illness was relevant to rebut the State's inevitable claim that the defendant drugged the victim or gave her alcohol. In response, the State assured the Court that it had no intention of claiming that Chenault drugged the victim or successfully gave her alcohol. This "assurance," in addition to being complied with, was never reduced to a stipulation or court order. It was offered as an explanation to the court about what the evidence was going to show, so that the court could make an informed decision on defense counsel's attempt to malign the victim with the boogeyman of her mental illness. The prosecutor did not commit misconduct by making this remark. Chenault's claims of prosecutorial misconduct fail.

IV. CUMULATIVE ERROR DID NOT DEPRIVE CHENAULT OF A FAIR TRIAL.

Chenault claims that cumulative error denied him a fair trial. But he has only demonstrated one actual error--when the prosecutor argued the

defendant testified that the beer he brought to the spot was an Earthquake brand beer. As noted above, Chenault was not prejudiced by this error.

"Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, supra, at 766; *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 332, 868 P.2d 835 (1994). "Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." *State v. Weber*, 159 Wn. 2d 252, 279, 149 P.3d 646 (2006); *State v. Geiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *Weber* at 279. Such is the case here. Chenault was not denied a fair trial.

V. CHENAULT'S COMPLAINT ABOUT LEGAL FINANCIAL OBLIGATIONS IS NOT RIPE FOR REVIEW AND HE FAILED TO OBJECT TO THEIR IMPOSITION BELOW.

Chenault complains that the court imposed discretionary legal financial obligations without first inquiring into his present or future ability to pay those obligations. But Chenault presents no evidence that the State has yet sought to enforce collection of those financial obligations. Thus, his claim is not ripe for review. *State v. Bertrand,* 165 Wn.App. 393,

405, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012); *State v. Baldwin,* 63 Wn.App. 303, 310, 818 P.2d 1161 (1991).

Additionally, Chenault failed to object to the imposition of discretionary legal financial obligations below and has not argued or shown why he should be permitted to raise this issue for the first time on appeal. See RP 1543-1561, *State v. Blazina,* 174 Wn.App. 906, 911, 301 P.3d 492 (2013). Chenault's claim should fail.

D. CONCLUSION

Chenault's judgment and sentence should be affirmed in all respects.

DATED this 16th day of January, 2014.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

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